87-569

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MRS. PEGGY KERR DAVIS,
Petitioner

v.

EXXON CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Of Counsel:

CHARLES L. BLACK AYCOCK
Jefferson Chemical Building
Suite 202
3336 Richmond Avenue
Houston, Texas
(713) 526-1660
State Bar of Texas
No. 01459000

GEORGE W. BROWN, JR.
Attorney at Law
395 Tenth Street
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Beaumont, Texas 77702
(409) 835-5355

Counsel of Record
for Petitioner

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

92 pp

QUESTIONS PRESENTED

1. May a State's rules of appellate procedure unreasonably limit the time within which a material portion of the record on appeal may be filed with the appellate court?

2. May a State's rules of appellate procedure constitutionally provide that an appellate court shall have no authority to consider a late filed but substantial and material portion of the record on appeal, except where a motion reasonably explaining the need therefor is filed with the appellate court not later than fifteen days after the last date for filing thereof, without also providing that any clerk's notice of the failure to timely file such motion must be given promptly after such last date?

3. May State courts constitutionally decline to consider a material portion of the record on appeal, where the appealing party timely deposits a sufficient motion for late filing of such portion, and promptly takes proper, substantial and material steps to reurge such request for such late filing immediately upon and at the earliest possible time after discovering that such motion was lost in the mail?

4. May a State court constitutionally deny an appealing party relief warranted by the undisputed facts otherwise appearing of record, merely because such court holds that a portion of the record on appeal may not be considered because a motion for extension of time to file such portion of the record was technically filed late according to a literal reading of the State's rules of appellate procedure?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Peggy Kerr Davis and the respondent Exxon Corporation.

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TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MRS. PEGGY KERR DAVIS,
Petitioner

v.

EXXON CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The petitioner Peggy Kerr Davis respectfully prays that a writ of certiorari issue to review the refusal, entered in the proceedings below on May 20, 1987 by the Supreme Court of Texas of petitioner's application for writ of error with the notation No Reversible Error, declining to review the Order of the Court of Appeals for the Ninth Supreme Judicial District of Texas denying petitioner's motion for extension of time to file the statement of facts, or the opinion and judgment of the Court of Appeals affirming the judgment of the trial court.

OPINIONS, JUDGMENTS AND ORDERS BELOW

The said refusal of petitioner's application rendered May 20, 1987 (p. 54a-55a) and overruling of petitioner's motion for rehearing rendered July 15, 1987 (p. 75a) by the Supreme Court of Texas, the said opinion (p. 39a-45a) and judgment (p. 46a) both rendered February 19, 1987, and overruling of petitioner's motion for rehearing rendered March 11, 1987 (p. 50a) by said Court of Appeals and its order rendered September 3, 1986 (p. 35a) denying petitioner's said motion for extension have not been reported, and are reprinted in the appendix hereto.

JURISDICTION

The jurisdiction of this Court to review the said opinions, judgments and orders below is invoked under 28 U.S.C. Section 1257(3), Rules 17.1(b) and (c) of the Rules of the Supreme Court of the United States, and Amendment Fourteen (14) of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution, Amendment 14, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Constitution, Article 1, Section 13 provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

Rule 50(a), Texas Rules of Appellate Procedure (hereinafter "Appellate Rules") provides:

> "The record on appeal shall consist of a transcript and where necessary to the appeal, a statement of facts."

Rule 53(i), Appellate Rules provides:

> "A statement of facts prepared by the official reporter shall be in question and answer form."

Rule 54(a), Appellate Rules (formerly Rule 386, Texas Rules of Civil Procedure) provides:

> "The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, within one hundred days after the judgment is signed. If a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time, shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on

> the court's own motion, as the court shall determine. The court shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule."

Rule 54(c), Appellate Rules [formerly Rule 21(c), Texas Rules of Civil Procedure] provides:

> "An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by an appellant with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a)."

STATEMENT OF THE CASE

After trial to a jury, Petitioner's motions to disregard certain jury findings and render judgment on others and for new trial were denied, and judgment was rendered for the Respondent. Petitioner then duly perfected her appeal to the Court of Appeals for the Ninth Judicial District of Texas.

Petitioner timely filed the original Transcript. Petitioner's first motion for extension of time to file the statement of facts (p. 1a-2a), the court reporter through attached affidavit (p. 3a-5a) explaining that due to other obligations, she was unable to complete the statement of facts in time to file it with the Court of Appeals by the February 13, 1986 deadline, was granted (p. 6a), extending the time to May 15, 1986 as requested by the reporter (p. 3a-5a).

Petitioner's second such motion for extension (p. 15a-19a) with an attached reporter's affidavit (p. 17a-19a) again explaining the reporter's inability to complete the statement of facts in time for filing on May 15, 1986, and requesting a new deadline of August 13, 1986 (p. 17a) was deposited in the mail on May 12, 1986 (see affidavit, p. 13a-14a, and transmittal letter, p. 20a) and received by counsel for the Respondent on May 16, 1986 (see again affidavit, p. 13a-14a). The fifteenth day after May 15, 1986 [prescribed by said Appellate Rule 54(c)] was May 30, 1986.

On June 11, 1986, Petitioner's counsel received a letter from the clerk (p. 26a) dated June 6, 1986 and postmarked June 9, 1986 (see verified motion, page 10a) revealing that Petitioner's second motion for extension had not been received by the clerk. On June 12, 1986, Petitioner delivered to the clerk via Federal Express a transmittal letter (p. 7a-8a), enclosing another signed original of her second motion for extension, with a motion for extension of time to file the second motion (p. 9a-12a) and attached exhibits (p. 13a-26a) informing the clerk that the letter enclosing the second motion mailed on May 12, 1986 (p. 20a) had evidently been lost in the mail, and that the clerk's June 6 letter, not received by Petitioner's counsel until June 11, was the first notice or knowledge to such counsel that the second motion enclosed with the May 12 letter had not been received. On August 28, 1986, Petitioner supplemented her second motion with the court reporter's affidavit (p. 27a-32a) explaining the need for an additional day, until August 14, 1986 to file the statement of facts.

The clerk by letters dated August 14, 1986, acknowledged receipt and filing of Petitioner's second motion

for extension (p. 33a), and that the statement of facts and exhibits [consisting of thirteen (13) volumes (see p. 31a)] were received and marked "Received August 14, 1986" but were not filed (p. 34a).

By letter dated September 3, 1986 (p. 35a) the clerk gave notice of the court's denial on that date of Petitioner's motion for extension of time to file her second motion for extension of time to file the statement of facts. Thereafter, the court of appeals affirmed the judgment for Respondent, stating (p. 39a), among other things, that since Petitioner did not file her second motion for extension of time to file the statement of facts within 15 days after it was due, the court was "powerless to extend the time for filing the statement of facts".

In her brief (p. 36a-38a) and motion for rehearing (p. 47a-49a) in the court of appeals and her application for writ of error (p. 51a-53a) and motion for rehearing (p. 56a-74a) in the Supreme Court of Texas, Petitioner argued that the court of appeals' denial (p. 35a) of her motion for extension of time to file the statement of facts under the circumstances was a violation of the Constitutions of the United States and the State of Texas.

The Supreme Court of Texas overruled Petitioner's motion for rehearing on July 15, 1987 (p. 75a-76a).

REASONS FOR GRANTING THE WRIT

The authorities and Respondent's judicial admissions and other undisputed facts pointed out in Petitioner's motion for rehearing in the Supreme Court of Texas (see excerpts, p. 56a-73a) make it clearly evident that the record below conclusively supports Petitioner's right to the relief she claimed. The operative facts, including the

confidential relationship and the breach thereof (p. 59a), and Respondent's gaining of substantial benefits through such breach (p. 63a), were judicially admitted uncontroverted facts, and it was undisputed that Respondent failed to carry its burden to prove its limitations defense (p. 64a).

Therefore, the Court of Appeals' unconstitutional determination that it was "powerless to extend the time for filing the statement of facts" (p. 39a) undoubtedly was a substantial factor in its affirmance of the trial court's judgment for Respondent (p. 45a) and the refusal of Petitioner's application for writ of error (p. 54a-55a) and overruling of Petitioner's motion for rehearing (p. 75a) by the Supreme Court of Texas.

Why did the clerk wait until June 6, 1986 [see p. 26a, almost a week after May 30, the fifteenth day after the due date for the second motion under Appellate Rule 54(c)] to notify Petitioner that her second motion for extension had not been received? It would have been just as easy for the clerk to give such notice on May 16, 1987, the day after the due date and plenty of time prior to May 30 for Petitioner to have complied with Rule 54(c). If the clerk is to give such notice at all, why doesn't Appellate Rule 54(c) provide that it is to be given on the day after the due date? Wouldn't this be the most logical and fair approach? In the absence of such provision or practice, Rule 54(c) lays an unconstitutional trap for appealing parties, out of their reasonable control and totally dependent on perfect performance by U.S. Post Office personnel. Such trap is calculated to frustrate an appealing party's right to ready access to the courts, upon the slightest inadvertence by the U.S. Post Office.

Under the circumstances of this case, Appellate Rules 54(a) and 54(c) are unconstitutional as construed by the Courts below. Petitioner did all she reasonably could to see that her Second Motion for Extension of Time to File a Statement of Facts was timely filed under Appellate Rule 54(c). Said Second Motion was mailed to the Clerk of the Court of Appeals on May 12, 1986 and photocopies were mailed to and received on May 16, 1986 by Respondent Exxon's counsel (see affidavit, p. 13a-14a). The first knowledge or notice to Petitioner that said Motion and transmittal letter had not been received by the Clerk was contained in the Clerk's transmittal letter dated June 6, 1986 (see again p. 13a-14a) postmarked June 9, 1986 and delivered by the postman to the office of the undersigned on June 11, 1986 (see p. 10a). Nothing further could reasonably have been done by the Petitioner to secure timely filing of her Second Motion for Extension.

Ready access to the Courts is a fundamental constitutional right, see *Ruiz v. Estelle,* 679 F.2d 1115, 1184 (5th Cir. 1982) at page 1153. On the plains of Runnymede in the year 1215, the Magna Charta originally guaranteed that "we will not deny to any man either justice or right", see 16D C.J.S. *Constitutional Law* § 1428 at page 678. In Texas the constitutional guaranty of open courts and insuring a remedy for injuries to person and property confers a right of appeal from an inferior to an appellate court, *Dillingham v. Putnam,* 14 S.W. 303, 109 Tex. 1 (1890), and any restrictions thereon should be liberally construed in favor of such right, 16D C.J.S. *Constitutional Law* § 1437 at page 700; *Stroud v. Ward,* 36 S.W.2d 590, 592 (Tex. Civ. App. —Waco 1931, no writ). While the constitutional guaranty of access to the courts is not impinged by *reasonably*

limiting the time within which an action may or must be commenced, 16D C.J.S. *Constitutional Law* § 1433 at page 694, an *unreasonable* abridgment of the right to obtain redress for injuries is a violation of the guarantee, *id.* at page 695.

In this situation, the Petitioner could reasonably not have known or done anything until receiving notice from the Clerk of the Court of Appeals that the Second Motion for Extension of Time to File Statement of Facts had not been received, and such notice was not received until June 11, 1986, almost two (2) weeks after May 30 (the 15th day after May 15, 1986 and the last day under Appellate Rule 54(c) for filing of the Motion for extension of time to file statement of facts). This is true notwithstanding the Second Motion was mailed to the Clerk on May 12, 1986, plenty of time prior to May 30, 1986 and was received by Respondent's attorney on May 16, 1986.

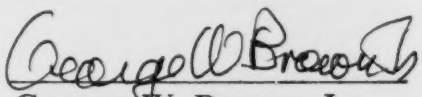
Appellate Rules 54(a) and 54(c) are in this context in the nature of statutes of limitations, and this case is similar to the situation in which a statute of limitations was held to violate the constitutional guaranty of access to the courts, where a medical malpractice plaintiff did not discover a sponge was left in his abdomen until more than two (2) years after the appendectomy, see *Neagle v. Nelson,* 685 S.W.2d 11, 15 (Tex. 1985), and to the situation in which medical malpractice plaintiff did not discover the nature of her injury until nine (9) years after her operation, see *Baldridge v. Howard,* 708 S.W.2d 62, 66 (Tex. Civ. App.—Dallas 1986, no writ) at page 66. In *Neagle,* the holding was based upon the assumption that Neagle *reasonably* should not have known of his injury during the period of limitation, (see con-

curring opinion, 685 S.W.2d at 14). Similarly, the Petitioner should *reasonably* not have known that the Petitioner's Motion had not been received by the Clerk of the Court of Appeals until notice from the Clerk which was given which was *after* the 15th day prescribed by Appellate Rule 54(c).

CONCLUSION

For the above reasons, this petition for certiorari should be granted, and the judgments and orders below should be reversed and remanded for consideration in the light of the statement of facts and exhibits.

Respectfully submitted,



GEORGE W. BROWN, JR.
Attorney at Law
395 Tenth Street
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(409) 835-5355

Counsel of Record
for Petitioner

Of Counsel:

CHARLES L. BLACK AYCOCK
Jefferson Chemical Building
Suite 202
3336 Richmond Avenue
Houston, Texas
(713) 526-1660

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 1987, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to James R. Stevens, Jr., counsel for Exxon, 1839 Exxon Bldg., P. O. Box 2180, Houston, Texas 77001.

George W. Brown Jr.

GEORGE W. BROWN, JR.

Counsel of Record
for Petitioner

APPENDIX 1

First motion for extension of time to file statement of facts.

NO. 09-86-00027-CV

IN THE COURT OF APPEALS FOR THE
9th SUPREME JUDICIAL DISTRICT

MRS. PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE STATEMENT OF FACTS

Attached hereto is an affidavit by the Court Reporter reasonably explaining the need for an extension of time to May 15, 1986 for filing the Statement of Facts.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court extend the time for filing the Statement of Facts through May 15, 1986.

Respectfully submitted,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 522-1329

ATTORNEY FOR PEGGY
KERR DAVIS, APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been was deposited into the care and custody of the United States Postal Service via Certified Mail, Return Receipt Requested to Mr. James R. Stevens, Attorney for Exxon Corporation, Appellee, P.O. Box 2180, Room 1839 E, Exxon Building, Houston, Texas 77001 on this the 11th day of February, 1986.

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

NO. 26,980

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS 2nd 9th JUDICIAL DISTRICT

PEGGY KERR DAVIS

v.

EXXON CORPORATION

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared MARY L. JOHNSON, known to me to be a credible person who upon her oath did depose as follows:

"I am MARY L. JOHNSON, being a resident of Conroe, Montgomery County, Texas, and being the Certified Official Court Reporter for the 2nd 9th Judicial District, comprising of Montgomery, Polk, San Jacinto, and Trinity Counties, request an extension of time for the filing of the Statement of Facts in the above entitled cause, which is on appeal in the 2nd 9th District Court of Montgomery County, Texas, for the following reasons:

1. The date the appeal was requested was December 19, 1985. The Statement of Facts is prepared at the Plaintiff's request. Now due February 14, 1986.

2. The date the extension is requested is ninety days (90), which will be due May 15, 1986.

3. The circumstances explaining the delay is that I need additional time to finish transcribing this

Statement of Facts and proofing. Also, we are in a murder case in Polk County which will last approximately five weeks—THE STATE OF TEXAS VS. HURLEY FONTENOT, CAUSE NUMBER 11,266.

The cases that I have pending are as follows:

17,448—THE STATE OF TEXAS VS DANNY RAY HARRIS (CAPITAL MURDER CASE)

6956, 6957, 6958—THE STATE OF TEXAS VS GENE WILFORD HATHORN, JR. (CAPITAL MURDER CASE)

36,822 36,850—JULES HALTENBERGER, et al VS CHALLENGER SALES & SUPPLY, et al

11,042—THE STATE OF TEXAS VS BILLY C. GREEN

4. This is my first extension.

FURTHER AFFIANT SAYETH NOT."

/s/ MARY L. JOHNSON
Mary L. Johnson, CSR
Certified Official Court Reporter
P. O. BOX 2220
CONROE, TEXAS 77305
CERTIFICATE #748
EXPIRATION 12/31/86

SUBSCRIBED AND SWORN TO BEFORE ME BY MARY L. JOHNSON.

WITNESS my hand and seal this 23rd day of January, 1986.

/s/ MEREDITH DUNAWAY
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS
COMMISSION EXPIRES
11/16/88

CC: Peggy Stevens
District Clerk
Montgomery County Courthouse
Conroe, Texas 77301

Mr. James R. Stevens
Attorney at Law
P. O. Box 2180
Houston, Texas 77001

Mr. Jerald D. Crow
Attorney at Law
414 W. Phillips
Conroe, Texas 77301

APPENDIX 2

Clerk's notice of granting of extension to May 15, 1986.

COURT OF APPEALS
Ninth Supreme Judicial District of Texas
1001 Pearl, Suite 330
Beaumont, Texas 77701
Phone 409 835-8402

February 18, 1986

Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

James R. Stevens, Jr.
1839 Exxon Building
P. O. Box 2180
Houston, TX 77001

RE: CASE NO. 09-86-00027-CV

STYLE: Davis, Peggy Kerr (Mrs.)
V: Exxon Corporation

The Appellant's Motion for extension of time to file Statement of Facts in the above styled and numbered cause was granted this date. The Statement of Facts will be due to be filed on or before May 15, 1986.

Respectfully yours,

Clerk, Ninth Court of Appeals

By /s/ CAROLYN HINTON
Deputy

Mary Johnson
Court Reporter
Montgomery County Courthouse
Conroe, TX 77301

APPENDIX 3

June 12, 1986 Transmittal letter to clerk enclosing petitioner's second motion for extension of time to file statement of facts, and motion for extension of time to file said second motion.

Charles L. Black Aycock
Attorney at Law
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 522-1329

FEDERAL EXPRESS

June 12, 1986

Clerk
9th Court of Appeals
1001 Pearl Street
Suite 330
Beaumont, Texas 77701

Re: Cause No. 26,980; Mrs. Peggy Kerr Davis vs. Exxon Corporation; In the District Court of Montgomery County, Texas; Second 9th Judicial District

Dear Sir:

Enclosed are the following, to-wit:

1. Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts; and
2. Appellant's Second Motion for Extension of Time to File Statement of Facts.

Please telephone me collect to notify me of receipt of this letter and enclosures.

Respectfully,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

CLBA:ta

enclosure
Wkg#3/Letter2a

cc: Mr. James R. Stevens (w/encl.)
Mr. Lamar W. Davis, Jr. (w/encl.)

APPENDIX 4

Petitioner's motion (with attached exhibits) for extension of time to file second motion for extension.

NO. 09-86-027-CV

IN THE COURT OF APPEALS FOR THE
9th SUPREME JUDICIAL DISTRICT

MRS. PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S SECOND MOTION FOR EXTENSION OF TIME TO FILE STATEMENT OF FACTS

I.

The transcript was timely filed herein. Appellant's original Motion for Extension of Time to File Statement of Facts was timely filed, and an extension was granted until May 15, 1986 to file the Statement of Facts.

II.

Attached hereto is a photocopy of Appellant's file copies of Appellant's Second Motion for Extension of Time to File Statement of Facts, marked Exhibit "A", and transmittal letter for said Second Motion dated May 12, 1986, marked Exhibit "B". The said Second Motion (Exhibit

"A") was mailed to the Clerk under said transmittal letter (Exhibit "B") on May 12, 1986 and photocopies were mailed to and received on May 16, 1986 by Appellee Exxon's counsel (see Exhibit "C" and Affidavit of Truzan Amos attached hereto). The first knowledge or notice to Appellant that said Motion and transmittal letter had not been received by the Clerk was contained in the Clerk's transmittal letter dated June 6, 1986, attached hereto and marked Exhibit "D", which was postmarked June 9, 1986 and delivered by the postman to the office of the undersigned June 11, 1986. Immediately after receipt of Exhibit "D", the undersigned prepared the above and foregoing Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts and a new Appellant's Second Motion for Extension of Time to File Statement Facts and immediately tendered the same to the Clerk via Federal Express for filing. It is evident that the Second Motion deposited in the mail on May 12, 1986 was lost in the mail. Such loss was beyond the control of the undersigned attorney or his staff. Under these circumstances, it was not possible for Appellant to have sooner tendered said Second Motion for filing.

III.

Many hundreds of hours and thousands of dollars in expense have been put into the preparation of the Statement of Facts and the underlying taking of testimony and preparation and introduction of exhibits in the Trial, by the Appellant, Appellant's counsel, Appellee, Appellee's counsel, and the court reporter. The Statement of Facts is completed and currently being proofread by the court reporter. The Statement of Facts is vital to all parties and the Court in the consideration of this case by the Court.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court permit late filing of the Second Motion for Extension of Time to File Statement of Facts which is tendered herewith, and prays the Court grant an extension of time for filing the Statement of Facts until August 13, 1986 as requested in said Second Motion.

Respectfully submitted,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 522-1329

ATTORNEY FOR PEGGY
KERR DAVIS, APPELLANT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Charles L. Black Aycock, who being by me sworn, upon his oath states that he is attorney for Mrs. Peggy Kerr Davis in the above entitled and numbered cause, and that he has read the above and foregoing Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts and knows that the matters of fact therein set out are true and correct.

/s/ CHARLES L. BLACK AYCOCK

SUBSCRIBED AND SWORN TO BEFORE ME by the said Charles L. Black Aycock, to certify which witness my hand and seal of office this 12th day of May, 1986.

/s/ TRUZAN AMOS
My Commission Expires: 11-1-88

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts has been was deposited into the care and custody of the United States Postal Service via Certified Mail, Return Receipt Requested to Mr. James R. Stevens, Attorney for Exxon Corporation, Appellee, P.O. Box 2180, Room 1839 E, Exxon Building, Houston, Texas 77001 on this the 12th day of June, 1986.

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

NO. 09-86-027-CV

IN THE COURT OF APPEALS FOR THE
9th SUPREME JUDICIAL DISTRICT

MRS. PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

AFFIDAVIT OF TRUZAN AMOS IN SUPPORT OF APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S SECOND MOTION FOR EXTENSION OF TIME TO FILE STATEMENT OF FACTS

Before me, a notary public in and for the State of Texas on this day personally appeared Truzan Amos who being by me here and now duly sworn, upon oath says:

The undersigned is secretary to Charles L. Black Aycock, attorney for the Appellant in the above and styled cause. The undersigned clearly recollects the following facts, to-wit:

On May 12, 1986, the undersigned folded the signed originals of the Second Motion for Extension of Time to File Statement of Facts (Exhibit "A") and the transmittal letter for said Second Motion (Exhibit "B") and inserted those original documents in an evelope addressed to the Clerk as shown in said transmittal letter (Exhibit "B"). Immediately thereafter, the undersigned affixed sufficient postage to secure delivery of the same to the Clerk through the United States Mail, and deposited said post-

age-prepaid envelope into the United States Mail depository at the main Post Office at 401 Franklin Street, Houston, Texas 77201. Concurrently, photocopies of Exhibits "A" and "B" were mailed to and received on May 16, 1986 by Appellee Exxon's Counsel (see Certificate of Service and photocopy of certified card attached to Exhibit "C"). The first knowledge or notice that the Clerk had not received said envelope and enclosures was given to Mr. Aycock and his staff when he reviewed the letter from the Clerk dated June 6, 1986 (Exhibit "D"), which was delivered by the postman to this office on June 11, 1986.

/s/ TRUZAN AMOS
Truzan Amos, Affiant

Subscribed and sworn to before me by the said Truzan Amos, this 12th day of June, 1986, to certify which witness my hand and seal of office.

/s/ TRUZAN AMOS
Notary Public
My Commission Expires: 11-1-88

NO. 09-86-027-CV

IN THE COURT OF APPEALS FOR THE
9th SUPREME JUDICIAL DISTRICT

MRS. PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

APPELLANT'S SECOND MOTION FOR
EXTENSION OF TIME TO FILE
STATEMENT OF FACTS

Attached hereto is an Affidavit by the Court Reporter reasonably explaining the need for a second extension of time to August 13, 1986 for filing the Statement of Facts.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court extend the time for filing the Statement of Facts through August 13, 1986.

Respectfully submitted,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 522-1329

ATTORNEY FOR PEGGY
KERR DAVIS, APPELLANT

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was deposited into the care and custody of the United States Postal Service via Certified Mail, Return Receipt Requested to Mr. James R. Stevens, Attorney for Exxon Corporation, Appellee, P. O. Box 2180, Room 1839 E, Exxon Building, Houston, Texas 77001 on this the 12th day of May, 1986.

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

NO. 26,980

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS 2nd 9th JUDICIAL DISTRICT

PEGGY KERR DAVIS

v.

EXXON CORPORATION

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared MARY L. JOHNSON, known to me to be a credible person who upon her oath did depose as follows:

"I am MARY L. JOHNSON, being a resident of Conroe, Montgomery County, Texas, and being the Certified Official Court Reporter for the 2nd 9th Judicial District, comprising of Montgomery, Polk, San Jacinto, and Trinity Counties, request an extension of time for the filing of the Statement of Facts in the above entitled cause, which is on appeal in the 2nd 9th District Court of Montgomery County, Texas, for the following reasons:

1. The date the appeal was requested was December 19, 1985. The Statement of Facts is prepared at the Plaintiff's request. Now due May 14, 1986.

2. The date the extension is requested is ninety (90) days, which will be due August 13, 1986.

3. The approximate length of the Statement of Facts is approximately 1750 pages.

4. The circumstances explaining the delay is that I need additional time to finish proofing this Statement of Facts. Also, this Court has been in murder trial in Polk County which lasted six weeks.

The cases that I have pending are as follows:

17,448—THE STATE OF TEXAS VS DANNY RAY HARRIS (CAPITAL MURDER CASE)

6956, 6957, 6958—THE STATE OF TEXAS VS GENE WILFORD HATHORN, JR. (CAPITAL MURDER CASE)

36,822, 36,850—JULES HALTENBERGER, ET AL VS CHALLENGER SALES & SUPPLY, ET AL

11,042—THE STATE OF TEXAS VS BILLY C. GREEN

4. This is my second extension.

FURTHER AFFIANT SAYETH NOT."

/s/ MARY L. JOHNSON
Mary L. Johnson
Certified Official Court Reporter
P. O. BOX 2220
CONROE, TEXAS 77305
CERTIFICATE #748
EXPIRATION 12/31/86

SUBSCRIBED AND SWORN TO BEFORE ME BY MARY L. JOHNSON.

WITNESS my hand and seal this 24th day of April, 1986.

/s/ MEREDITH DUNAWAY
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS
COMMISSION EXPIRES
11/16/88

CC: PEGGY STEVENS
DISTRICT CLERK
MONTGOMERY COUNTY COURTHOUSE
CONROE, TEXAS 77301

MR. JAMES R. STEVENS
ATTORNEY AT LAW
P. O. BOX 2180
HOUSTON, TEXAS 77001

MR. JERALD D. CROW
ATTORNEY AT LAW
414 W. Phillips
Conroe, Texas 77301

CHARLES L. BLACK AYCOCK
Attorney at Law
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019

(713) 522-1329

May 12, 1986

9th Court of Appeals
1001 Pearl Street
Suite 330
Beaumont, Texas 77701

Re: Cause No. 26,980; Mrs. Peggy Kerr Davis v. Exxon Corporation; In the District Court of Montgomery County, Texas; Second 9th Judicial District.

Dear Sir:

Enclosed is Appellant's Second Motion for Extension of Time to File Statement of Facts with attached Affidavit.

Respectfully,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

CLBA:ta

enclosure

Wkg #3/Letter 2

cc: Mr. James R. Stevens (w/encl.)
Mr. Lamar W. Davis, Jr. (w/encl.)

EXHIBIT B

NO. 26,980

IN THE COURT OF APPEALS FOR THE
9th SUPREME JUDICIAL DISTRICT

MRS. PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

APPELLANT'S SECOND MOTION FOR EXTENSION OF TIME TO FILE STATEMENT OF FACTS

Attached hereto is an Affidavit by the Court Reporter reasonably explaining the need for a second extension of time to August 13, 1986 for filing the Statement of Facts.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court extend the time for filing the Statement of Facts through August 13, 1986.

Respectfully submitted,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 522-1329

ATTORNEY FOR PEGGY
KERR DAVIS, APPELLANT

EXHIBIT C

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been was deposited into the care and custody of the United States Postal Service via Certified Mail, Return Receipt Requested to Mr. James R. Stevens, Attorney for Exxon Corporation, Appellee, P.O. Box 2180, Room 1839 E, Exxon Building, Houston, Texas 77001 on this the 12th day of May, 1986.

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

NO. 26,980

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS 2nd 9th JUDICIAL DISTRICT

PEGGY KERR DAVIS

v.

EXXON CORPORATION

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared MARY L. JOHNSON, known to me to be a credible person who upon her oath did depose as follows:

> "I am MARY L. JOHNSON, being a resident of Conroe, Montgomery County, Texas, and being the Certified Official Court Reporter for the 2nd 9th Judicial District, comprising of Montgomery, Polk,

San Jacinto, and Trinity Counties, request an extension of time for the filing of the Statement of Facts in the above entitled cause, which is on appeal in the 2nd 9th District Court of Montgomery County, Texas, for the following reasons:

1. The date the appeal was requested was December 19, 1985. The Statement of Facts is prepared at the Plaintiff's request. Now due May 14, 1986.

2. The date the extension is requested is ninety (90) days, which will be due August 13, 1986.

3. The approximate length of the Statement of Facts is approximately 1750 pages.

4. The circumstances explaining the delay is that I need additional time to finish proofing this Statement of Facts. Also, this Court has been in murder trial in Polk County which lasted six weeks.

The cases that I have pending are as follows:

17,448—THE STATE OF TEXAS VS DANNY RAY HARRIS (CAPITAL MURDER CASE)

6956, 6957, 6958—THE STATE OF TEXAS VS GENE WILFORD HATHORN, JR. (CAPITAL MURDER CASE)

36,822, 36,850—JULES HALTENBERGER, ET AL VS CHALLENGER SALES & SUPPLY ET AL

11,042—THE STATE OF TEXAS VS BILLY C. GREEN

4. This is my second extension.

FURTHER AFFIANT SAYETH NOT."

/s/ MARY L. JOHNSON
Mary L. Johnson
Certified Official Court Reporter
P. O. BOX 2220
CONROE, TEXAS 77305
CERTIFICATE #748
EXPIRATION 12/31/86

SUBSCRIBED AND SWORN TO BEFORE ME BY MARY L. JOHNSON.

WITNESS my hand and seal this 24th day of April, 1986.

/s/ MEREDITH DUNAWAY
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS
COMMISSION EXPIRES
11/16/88

CC: PEGGY STEVENS
DISTRICT CLERK
MONTGOMERY COUNTY COURTHOUSE
CONROE, TEXAS 77301

MR. JAMES R. STEVENS
ATTORNEY AT LAW
P. O. BOX 2180
HOUSTON, TEXAS 77001

MR. JERALD D. CROW
ATTORNEY AT LAW
414 W. Phillips
Conroe, Texas 77301

COURT OF APPEALS
State of Texas
Ninth Court of Appeals District

June 6, 1986

Mr. Charles L. Aycock
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019

In Re: No. 09 86 027 CV, Mrs. Peggy Kerr Davis vs. Exxon Corporation

Dear Mr. Aycock,

The Transcript in the above styled and numbered cause was filed in our office February 12, 1986 and motion for extension of time to file Statement of Facts filed same date, granted and time extended to May 15, 1986 for filing of Statement of Facts. The Statement of Facts has not been filed as of this date, nor has a motion for extension of time been filed.

Would you please advise the Court as to the status of this appeal and if the appellant no longer wishes to proceed, file a motion to dismiss the appeal.

Sincerely,

/s/ SHIRLEY FORREST
Shirley Forrest,
Clerk

cc: James R. Stevens, Jr.
1839 Exxon Building
P. O. Box 2180
Houston, Texas 77001

EXHIBIT D

APPENDIX 5

Petitioner's first supplement to her second motion for extension of time to file statement of facts.

NO. 09-86 027 CV

IN THE COURT OF APPEALS
For The 9th Supreme Judicial District

MRS. PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

(Filed August 28, 1986)

FIRST SUPPLEMENT TO APPELLANT'S SECOND MOTION FOR EXTENSION OF TIME TO FILE STATEMENT OF FACTS

Appellant's Second Motion for Extension of Time to File Statement of Facts was filed August 14, 1986 requested a second extension of time to August 13, 1986 for the filing of the Statement of Facts. Supplementary thereto, attached hereto is an Affidavit by the Court Reporter reasonably explaining the need for a second extension of time to August 14, 1986 for filing the Statement of Facts.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court extend the time for filing the

Statement of Facts through August 14, 1986.

Respectfully submitted,

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 522-1329

Attorney for Peggy Kerr Davis, Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was deposited into the care and custody of the United States Postal Service via Certified Mail, Return Receipt Requested to Mr. James R. Stevens, Attorney for Exxon Corporation, Appellee, P. O. Box 2180, Room 1839 E, Exxon Building, Houston, Texas 77001 on this the 28th day of August, 1986.

/s/ CHARLES L. BLACK AYCOCK
Charles L. Black Aycock

NO. 26,980

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS SECOND 9TH JUDICIAL DISTRICT

PEGGY KERR DAVIS

v.

EXXON CORPORATION

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared MARY L. JOHNSON, known to me to be a credible person who upon her oath did depose as follows:

"I am MARY L. JOHNSON, being a resident of Conroe, Montgomery County, Texas, and being the Certified Official Court Reporter for the 2nd 9th Judicial District comprising of Montgomery, Polk, San Jacinto, and Trinity Counties, in my Affidavit signed April, 1986, attached to Appellant's Second Motion for Extension of Time to File Statement of Facts, requested an extension of time for the filing of the Statement of Facts in the above entitled cause, which is on appeal in the 2nd 9th District Court of Montgomery County, Texas, for the following reasons:

1. The date the appeal was requested was December 19, 1985. The Statement of Facts is prepared at the Plaintiff's request. Now due May 14, 1986.
2. The date the extension was requested was ninety (90) days, which would have been due August 13, 1986.

3. The approximate length of the Statement of Facts stated was estimated to be 1750 pages.

4. The circumstances explaining the delay were that I needed additional time to finish proofing this Statement of Facts. Also, this Court had been in a murder trial in Polk County which lasted six weeks; and the cases that I had pending at that time were as follows, to-wit:

17,448—THE STATE OF TEXAS V. DANRAY HARRIS (CAPITAL MURDER CASE)

6956, 6957, 6958—THE STATE OF TEXAS VS GENE WILFORD HATHORN, JR. (CAPITAL MURDER CASE)

36,822, 36,850—JULES HALTENBERGER, ET AL VS CHALLENGER SALES & SUPPLY, ET AL

11,042—THE STATE OF TEXAS VS. BILLY C. GREEN

6. The cases that I had pending which affected my ability to send the statement of facts and exhibits to this court for filing on or before August 13, 1986, are the above described cases.

7. The statement of facts and exhibits were sent to Shirley Forrest, Clerk, Ninth Court of Appeals, 1001 Pearl, Suite 330, Beaumont, Texas 77701, on August 13, 1986, via first-class United States mail, postage prepaid (being United States Express Mail, Next Day Service) in envelopes ad-

dressed to that address. The entire and complete record of all the proceedings had and testimony and evidence presented at the trial is contained in the statement of facts consisting of ten (10) volumes marked as follows, to-wit:

VOLUME II OF 13 VOLUMES
VOLUME III OF 13 VOLUMES
VOLUME IV OF 13 VOLUMES
VOLUME V OF 13 VOLUMES
VOLUME VI OF 13 VOLUMES
VOLUME VII OF 13 VOLUMES
VOLUME VIII OF 13 VOLUMES
VOLUME IX OF 13 VOLUMES
VOLUME X OF 13 VOLUMES
VOLUME XI OF 13 VOLUMES,

and the exhibits, contained in the following, to-wit:

EXHIBITS VOLUME-PLAINTIFF, VOLUME XII OF 13 VOLUMES
EXHIBITS VOLUME-DEFENDANT, VOLUME XIII OF 13 VOLUMES,

all of which were sent to the Clerk as above described.

The exhibits in this case are very voluminous and complicated. Completion of the statement of facts and exhibits in this case and the press of the work on the other above described cases preventing me from sending the statement of facts and exhibits in this case to the clerk any sooner, and I have heretofore requested on the record that the statement of facts and exhibits be filed as of the date of receipt by the Court of Appeals, to-wit: August 14, 1986. For the above reasons, I also request on extension for filing of the statement of facts and exhibits until August

14, 1986, the date of receipt of the same by the Court of Appeals.

5. This is my third extension.

FURTHER AFFIANT SAYETH NOT."

/s/ MARY L. JOHNSON
Mary L. Johnson
Certified Official Court Reporter
P.O. Box 2220
CONROE, TEXAS 77305
CERTIFICATE #748
EXPIRATION 12/31/86

SUBSCRIBED AND SWORN TO BEFORE ME BY MARY L. JOHNSON. WITNESS my hand and seal this 28th day of August, 1986.

/s/ SHIRLEY BURZINSKI
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS
COMMISSION EXPIRES:
6/30/88

cc: PEGGY STEVENS
DISTRICT CLERK
MONTGOMERY COUNTY COURTHOUSE
CONROE, TEXAS 77301

MR. JAMES R. STEVENS
ATTORNEY AT LAW
P. O. BOX 2180
HOUSTON, TEXAS 77001

MR. JERALD D. CROW
ATTORNEY AT LAW
414 W. PHILLIPS
CONROE, TEXAS 77301

APPENDIX 6

Clerk's notice of filing of Petitioner's second motion for extension of time to file statement of facts.

COURT OF APPEALS
Ninth District of State of Texas
1001 Pearl, Suite 330
Beaumont, Texas 77701
Phone 409 835-8402
SHIRLEY FORREST, CLERK

August 14, 1986

Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

James R. Stevens, Jr.
1839 Exxon Building
P. O. Box 2180
Houston, TX 77001

RE: CASE NO. 09-86-00027-CV

STYLE: Davis, Peggy Kerr (Mrs.)
V: Exxon Corporation

The Appellant's Motion for Extension of time to file the Statement of Facts in the above styled and numbered cause was filed this date. You will be notified when the Court acts on this motion.

Respectfully yours,

Shirley Forrest, Clerk

By /s/ SHIRLEY FORREST

APPENDIX 7

Clerk's notice of receipt of statement of facts and exhibits.

COURT OF APPEALS
Ninth District of State of Texas
1001 Pearl, Suite 330
Beaumont, Texas 77701
Phone 409 835-8402
SHIRLEY FORREST, CLERK

August 14, 1986

Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

James R. Stevens, Jr.
1839 Exxon Building
P. O. Box 2180
Houston, TX 77001

RE: CASE NO. 09-86-00027-CV

STYLE: Davis, Peggy Kerr (Mrs.)
V: Exxon Corporation

The Statement of Facts and exhibits in the above styled and numbered cause were received this date and marked "Received August 14, 1986", but were not filed.

Respectfully yours,

Shirley Forrest, Clerk

By /s/ SHIRLEY FORREST

APPENDIX 8

Clerk's notice of denial of Petitioner's motion for extension of time to file her second motion for extension of time to file statement of facts.

COURT OF APPEALS
Ninth District of State of Texas
1001 Pearl, Suite 330
Beaumont, Texas 77701
Phone 409 835-8402
SHIRLEY FORREST, CLERK

September 3, 1986

Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

James R. Stevens, Jr.
1839 Exxon Building
P. O. Box 2180
Houston, TX 77001

RE: CASE NO. 09-86-00027-CV

STYLE: Davis, Peggy Kerr (Mrs.)
V: Exxon Corporation

The Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts in the above styled and numbered cause was denied this date.

Respectfully yours,

Shirley Forrest, Clerk

By /s/ CAROLYN HINTON
Deputy

Mary Johnson
Court Reporter
Montgomery County Courthouse
Conroe, TX 77301

APPENDIX 9

Excerpts from Petitioner's brief in court of appeals preserving constitutional questions.

* * *

Under the circumstances of this case, Rules 386 and 21(c) are unconstitutional as construed by Appellee. Appellant did all she could to see that her Second Motion for Extension of Time to File a Statement of Facts was timely filed under Rule 21(c). Said Second Motion was mailed to the Clerk on May 12, 1986 and photocopies were mailed to and received on May 16, 1986 by Appellee Exxon's counsel [see Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts (hereinafter "Motion"), paragraph 2 and Affidavit of Truzan Amos]. The first knowledge or notice to Appellant that said Motion and transmittal letter had not been received by the Clerk was contained in the Clerk's transmittal letter date June 6, 1986 (see Exhibit "D" to Motion) postmarked June 9, 1986 and delivered by the postman to the office of the undersigned on June 11, 1986 (Motion, paragraph 2). This was far from avoidable (see Appellee's Motion, page 1). Nothing further could have been done by the Appellant to secure timely filing of her Motion for Extension.

Ready access to the Courts is a fundamental constitutional right, see *Ruiz v. Estelle,* 679 F.2d 1115, 1184 (5th Cir. 1982) at page 1153. On the plains of Runnymeade in the year 1215, the Magna Charta originally guaranteed that "we will not deny to any man either

justice or right", see 16D C.J.S. Constitutional Law § 1428 at page 678. In Texas the constitutional guaranty of open courts and insuring a remedy for injuries to person and property confers a right of appeal from an inferior to an appellate court, *Dillingham v. Putnam,* 14 S.W. 303, 109 Tex. 1 (1890), and any restrictions thereon should be liberally construed in favor of such right, 16D C.J.S. Constitutional Law § 1437 at page 700; *Stroud v. Ward,* 36 S.W.2d 590, 592 (Tex. Civ. App.—Waco 1931, no writ). While the constitutional guaranty of access to the courts is not impinged by *reasonably* limiting the time within which an action may or must be commenced, 16D C.J.S. Constitutional Law § 1433 at page 694, an *unreasonable* abridgment of the right to obtain redress for injuries is a violation of the guarantee, id. at page 695.

In this situation, the undersigned attorney could not have known or done anything until receiving notice from the Clerk that the Second Motion for Extension of Time to File Statement of Facts had not been received, and such notice was not received until June 11, 1986, almost two (2) weeks after May 30 (the 15th day after May 15, 1986 and the last day for filing of the Motion for extension of time to file statement of facts). This is true notwithstanding the Second Motion was mailed to the Clerk on May 12, 1986, plenty of time prior to May 30, 1986 and was received by Appellee's attorney on May 16, 1986.

Rules 386 and 21(c) are in this context in the nature of statutes of limitations, and this case is similar to the situation in which a statute of limitations was held to violate the constitutional guaranty of access to the courts, where a medical malpractice plaintiff did not discover a

sponge was left in his abdomen until more than two (2) years after the appendectomy, see *Neagle v. Nelson,* 685 S.W.2d 11, 15 (Tex. 1985), and to the situation in which medical malpractice plaintiff did not discover the nature of her injury until nine (9) years after her operation, see *Baldridge v. Howard,* 708 S.W.2d 62, 66 (Tex. Civ. App.—1986 Dallas, no writ) at page 66. In *Neagle,* the holding was based upon the assumption that Neagle *reasonably* should not have known of his injury during the period of limitation, (see concurring opinion, 685 S.W.2d at 14). Similarly, the undersigned attorney should *reasonably* not have known that the Appellant's Motion had not been received by the Clerk until notice from the Clerk which was given which was *after* the 15th day prescribed by Rule 21c.

* * *

APPENDIX 10

Opinion of court of appeals.

NO. 09-86-027-CV

Appealed From the 2nd 9th District Court of
Montgomery County, Texas

PEGGY KERR DAVIS,
Appellant

v.

EXXON CORPORATION,
Appellee

(Filed February 19, 1987)

OPINION

This is an oil and gas lease case. It was tried to a jury, but is on appeal without a statement of facts because appellant did not file her second motion for an extension of time to file the statement of facts within 15 days after it was due. TEX. R. App. P. 54(c) (formerly Tex. R. Civ. P. 21c). This court was, therefore, powerless to extend the time for filing the statement of facts. *Chojnacki v. Court of Appeals,* 699 S.W.2d 193 (Tex. 1985); *B.D. Click Co. v. Safari Drilling Corp.,* 638 S.W. 2d 860 (Tex. 1982).

The trial court entered a take nothing judgment against appellant. The judgment was based upon the following special issues and their answers:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Humble failed to operate the Becker No. 1 Well and the First Becker Lease as they would have been operated by a reasonably prudent operator acting under the same or similar circumstances as Humble?

Answer by writing: 'It did not operate them as a reasonably prudent operator' or 'It did operate them as a reasonably prudent operator.'

Answer: *It did operate them as a reasonably prudent operator.*

A 'reasonably prudent operator' is an operator of an oil and gas lease, who, acting with ordinary diligence and in accord with the laws of Texas and the rules of the Texas Railroad Commission, protects and produces the mineral estate in a reasonable manner, with that investment or expenditure of funds as is prudent for one who seeks a profitable return from the operation of the lease. If production once obtained ceases for any reason thereafter, the operator must with due diligence proceed to either resume drilling operations, if permitted by the Railroad Commission, or rework the well or wells on such land, but only if, the operator would have a reasonable expectation of producing additional oil from such well or wells in paying quantities. By the term 'paying quantities' as used in this charge, is meant the production of oil, if any, from the subject well and lease in such quantities that would give the lessee a profit after deducting the costs of drilling, equipping, operating and marketing, including but not limited to production taxes payable by the operator to the State of Texas on the production and all ad valorem taxes payable on the operator's interest in the well and lease.

. . . .

SPECIAL ISSUE NO. 4

Do you find from a preponderance of evidence that the Second Becker Lease was contemplated by the parties to be regarded as a 'substitution' for the First Becker Lease within the meaning of the language of the Plaintiff Davis' overriding royalty assignment.

Answer 'we do' or 'we do not.'

Answer: *We do not*

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that there was a confidential relationship between Humble and the Plaintiff overriding royalty owner Davis?

You are instructed that the term 'confidential relationship' as used in this charge includes every form of relationship between parties wherein confidence and special trust is reposed by one in another and he or she is justified in placing such trust and confidence in such other party, and relies upon such other party to protect his or her interest. A confidential relationship may arise out of the power, if any, entrusted by one party to another, and the superior knowledge, if any, of one party over another.

Answer 'we do' or 'we do not.'

Answer: *We do*

SPECIAL ISSUE NO. 6

Find from a preponderance of the evidence when the Herman Becker Well No. 1 ceased to produce.

Answer (month and year): *Oct. 19, 1969*

SPECIAL ISSUE NO. 7

Find from a preponderance of the evidence the date on which the plaintiff learned that the Herman Becker Well No. 1 ceased to produce.

Answer: *When Mr. Davis found it*

In connection with this issue you are instructed that knowledge of facts that would cause a reasonably prudent person to make an inquiry which would lead to the discovery that the Herman Becker Well No. 1 ceased to produce, constitutes knowledge that the well ceased to produce.

SPECIAL ISSUE NO. 8

Find from a preponderance of the evidence the date by which the plaintiff, through the exercise of reasonable diligence, should have learned that the Herman Becker Well No. 1 ceased to produce.

Answer: *Jan. 30, 1970*

In connection with this issue you are instructed that reasonable diligence means that degree of care that would be taken by a person of ordinary prudence if placed in the same situation as the plaintiff. You are further instructed that once a person, situated as was the plaintiff, has acquired knowledge that would cause a reasonably prudent person to inquire whether or not the Herman Becker Well No. 1 ceased to produce, that person has a duty to investigate whether or not the well ceased to produce. Such an investigation must be carried out with reasonable diligence.

While there is no statement of facts, there are facts common to both briefs. On July 23, 1954, Don C. Wiley acquired an oil and gas lease from the Herman Becker estate [the First Lease] and on September 3, 1954, Wiley executed and delivered an assignment to Mrs. D. F. Kerr

conveying an overriding royalty of 3/32nd of 7/8th of all oil and 3/32nd of the market value at the wellhead of all gas produced and saved from the First Lease and any "extension, renewal or substitution" for the First Lease. In 1962, Humble Oil, the corporate predecessor of Exxon, acquired the working interest in the First Lease. On April 18, 1967, Mrs. Kerr assigned her overriding royalty to her daughter, Mrs. Peggy Kerr Davis, appellant.

There was one well drilled on the Becker Tract. It was maintained and operated as a gas well until late 1969. It was then plugged in May or June 1970. Mrs. Davis received regular royalty checks at least through November 1969. Appellant's brief claims Mrs. Davis received regular royalty checks through December, 1970, but appellee alleges the last regular royalty check was in November 1969 and that the December 1970 check was for 17 cents.

On November 15, 1971, Humble took another lease on the Becker tract [the Second Lease]. In January 1973, Exxon drilled and completed an oil well on the tract. Appellant filed suit December 4, 1974, and claimed that Humble had intentionally abandoned the first well while it was capable of producing in paying quantities in order to eliminate appellants overriding royalties. The second amended original petition, filed in 1982, added the allegations that Exxon failed to act as a prudent operator by not drilling a second well on the First Lease and that the Second Lease was a "substitution for the first lease within the meaning of the assignment. . . ." In 1985, appellant supplemented the second amended original petition and alleged that a confidential relationship existed between herself and Exxon and that Exxon had breached its duty in not notifying her of the abandonment of the first well and/or not drilling a new well on the first lease in 1969.

Exxon entered general and special denials and asserted the statute of limitations on the basis that the cause of action, if any, arose in 1969 and therefore her December 1974 suit was time-barred.

Appellant brings forth three points of error:

Point of Error No. 1

> The trial court erred in failing to render judgment for Appellant on jury findings No. 5 and 7, because the imposition of a constructive trust and an accounting are required by the undisputed facts and jury finding 5, and due to the undisputed facts and Appellee's waiver of any complaint as to jury finding 7, Appellant is not barred by the statute of limitations.

Point of Error No. 2

> The trial court erred in rendering judgment for Appellee Exxon, because jury findings Nos. 5 and 7 and the undisputed facts required that the trial court disregard special issues Nos. 1, 2, 3, 4, 6, and 8, and render judgment for Appellant on jury findings Nos. 5 and 7.

Point of Error No. 3

> The trial court erred in rendering judgment for Appellee Exxon, because jury findings Nos. 1, 2, 3, 4, 6, and 8 should have been disregarded, having been rendered immaterial by jury findings No. 5 and 7.

The points of error center on the argument that the imposition of a constructive trust is required because the jury found a confidential relationship between the parties. A confidential relationship does not of itself give rise to

the imposition of a constructive trust. *Vaquero Petroleum Co. v. Simmons,* 636 S.W.2d 762 (Tex. App.—Corpus Christi 1982, no writ). There must be an abuse of an existing confidential relationship established by strict proof of a prior confidential relationship and unfair conduct on the part of the wrongdoer to merit that remedy. *Ginther v. Taub,* 675 S.W.2d 724 (Tex. 1984). The jury finding of a confidential relationship was, therefore, not controlling.

In short, the jury resolved, on all of appellant's theories of recovery, the facts adversely against her. It found that Exxon had operated the first well and first lease in a reasonably prudent manner, thus there was no abuse or breach of the confidenial relationship. It further found that the second lease was not intended as a substitution for the first lease. The trial court did not err in entering a take nothing judgment. The judgment of the trial court is affirmed.

AFFIRMED.

/s/ DON BURGESS
Don Burgess
Justice

Opinion Delivered
February 19, 1987
Do not publish

APPENDIX 11

Judgment of court of appeals.

COURT OF APPEALS
Ninth District of the State of Texas
1001 Pearl, Suite 330
Beaumont, Texas 77701

Shirley Forrest, Clerk

NO. 09 86 027 CV

PEGGY KERR DAVIS

v.

EXXON CORPORATION

Appealed from the 2nd 9th District Court of
Montgomery County

Judgment entered February 19, 1987

Opinion by Justice Don Burgess

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellant, Peggy Kerr Davis, and the surety on the appeal bond, Fidelity and Deposit Company. A copy of this judgment, shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

/s/ SHIRLEY FORREST
Shirley Forrest, Clerk

APPENDIX 12

Excerpt from Petitioner's motion for rehearing in court of appeals, preserving constitutional questions.

* * *

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR 7

Under the circumstances of this case, Rules 386 and 21(c) are unconstitutional as construed by Appellee. Appellant did all she could to see that her Second Motion for Extension of Time to File a Statement of Facts was timely filed under Rule 21(c). Said Second Motion was mailed to the Clerk on May 12, 1986 and photocopies were mailed to and received on May 16, 1986 by Appellee Exxon's counsel [see Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts (hereinafter "Motion"), paragraph 2 and Affidavit of Truzan Amos]. The first knowledge or notice to Appellant that said Motion and transmittal letter had not been received by the Clerk was contained in the Clerk's transmittal letter date June 6, 1986 (see Exhibit "D" to Motion) postmarked June 9, 1986 and delivered by the postman to the office of the undersigned on June 11, 1986 (Motion, paragraph 2). This was far from avoidable (see Appellee's Motion, page 1). Nothing further could have been done by the Appellant to secure timely filing of her Second Motion for Extension.

Ready access to the Courts is a fundamental constitutional right, see *Ruiz v. Estelle,* 679 F.2d 1115, 1184 (5th Cir. 1982) at page 1153. On the plains of Runny-

meade in the year 1215, the Magna Charta originally guaranteed that "we will not deny to any man either justice or right", see 16D C.J.S. *Constitutional Law* § 1428 at page 678. In Texas the constitutional guaranty of open courts and insuring a remedy for injuries to person and property confers a right of appeal from an inferior to an appellate court, *Dillingham v. Putnam,* 14 S.W. 303, 109 Tex. 1 (1890), and any restrictions thereon should be liberally construed in favor of such right, 16D C.J.S. *Constitutional Law* § 1437 at page 700; *Stroud v. Ward,* 36 S.W.2d 590, 592 (Tex. Civ. App.—Waco 1931, no writ). While the constitutional guaranty of access to the courts is not impinged by *reasonably* limiting the time within which an action may or must be commenced, 16D C.J.S. *Constitutional Law* § 1433 at page 694, an *unreasonable* abridgment of the right to obtain redress for injuries is a violation of the guarantee, id. at page 695.

In this situation, the undersigned attorney could not have known or done anything until receiving notice from the Clerk that the Second Motion for Extension of Time to File Statement of Facts had not been received, and such notice was not received until June 11, 1986, almost two (2) weeks after May 30 (the 15th day after May 15, 1986 and the last day for filing of the Motion for extension of time to file statement of facts). This is true notwithstanding the Second Motion was mailed to the Clerk on May 12, 1986, plenty of time prior to May 30, 1986 and was received by Appellee's attorney on May 16, 1986.

Rules 386 and 21(c) are in this context in the nature of statutes of limitations, and this case is similar to the

situation in which a statute of limitations was held to violate the constitutional guaranty of access to the courts, where a medical malpractice plaintiff did not discover a sponge was left in his abdomen until more than two (2) years after the appendectomy, see *Neagle v. Nelson,* 685 S.W.2d 11, 15 (Tex. 1985), and to the situation in which medical malpractice plaintiff did not discover the nature of her injury until nine (9) years after her operation, see *Baldridge v. Howard,* 708 S.W.2d 62, 66 (Tex. Civ. App.—1986 Dallas, no writ) at page 66. In *Neagle,* the holding was based upon the assumption that Neagle *reasonably* should not have known of his injury during the period of limitation, (see concurring opinion, 685 S.W. 2d at 14). Similarly, the undersigned attorney should *reasonably* not have known that the Appellant's Motion had not been received by the Clerk until notice from the Clerk which was given which was *after* the 15th day prescribed by Tex. R. Civ. P. 21c.

APPENDIX 13

Clerk's notice of overruling of Petitioner's motion for rehearing in court of appeals.

COURT OF APPEALS
Ninth District of State of Texas
1001 Pearl, Suite 330
Beaumont, Texas 77701
Phone 409 835-8402
Shirley Forrest, Clerk

March 11, 1987

Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

James R. Stevens, Jr.
1839 Exxon Building
P. O. Box 2180
Houston, TX 77001

William C. McClain
McClain, Harrell & McClain
InterFirst Bank Tower
300 West Davis, Suite 401
Conroe, TX 77301

RE: CASE NO. 09-86-00027-CV

STYLE: Davis, Peggy Kerr (Mrs.)
V: Exxon Corporation

The Appellant's Motion for Rehearing in the above styled and numbered cause was overruled this date.

Respectfully yours,

SHIRLEY FORREST, CLERK

APPENDIX 14

Excerpts from Petitioner's application for writ of error in Supreme Court of Texas preserving constitutional questions.

* * *

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR NO. 7

Under the circumstances of this case, Rules 386 and 21(c) are unconstitutional as construed by the Court of Appeals. Petitioner did all she could to see that her Second Motion for Extension of Time to File a Statement of Facts was timely filed under Rule 21(c). Said Second Motion was mailed to the Clerk of the Court of Appeals on May 12, 1986 and photocopies were mailed to and received on May 16, 1986 by Respondent Exxon's counsel [see Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts (hereinafter "Motion"), paragraph 2 and Affidavit of Truzan Amos]. The first knowledge or notice to Petitioner that said Motion and transmittal letter had not been received by the Clerk was contained in the Clerk's transmittal letter dated June 6, 1986 (see Exhibit "D" to Motion) postmarked June 9, 1986 and delivered by the postman to the office of the undersigned on June 11, 1986 (Motion, paragraph 2). Nothing further could have been done by the Petitioner to secure timely filing of her Second Motion for Extension.

Ready access to the Courts is a fundamental constitutional right, see *Ruiz v. Estelle,* 679 F.2d 1115, 1184 (5th Cir. 1982) at page 1153. On the plains of Runnymeade in the year 1215, the Magna Charta originally

guaranteed that "we will not deny to any man either justice or right", see 16D C.J.S. *Constitutional Law* § 1428 at page 678. In Texas the constitutional guaranty of open courts and insuring a remedy for injuries to person and property confers a right of appeal from an inferior to an appellate court, *Dillingham v. Putnam,* 14 S.W. 303, 109 Tex. 1 (1890), and any restrictions thereon should be liberally construed in favor of such right, 16D C.J.S. *Constitutional Law* § 1437 at page 700; *Stroud v. Ward,* 36 S.W.2d 590, 592 (Tex. Civ. App.—Waco 1931, no writ). While the constitutional guaranty of access to the courts is not impinged by reasonably limiting the time within which an action may or must be commenced, 16D C.J.S. *Constitutional Law* § 1433 at page 694, an unreasonable abridgment of the right to obtain redress for injuries is a violation of the guarantee, id. at page 695.

In this situation, the Petitioner could not have known or done anything until receiving notice from the Clerk of the Court of Appeals that the Second Motion for Extension of Time to File Statement of Facts had not been received, and such notice was not received until June 11, 1986, almost two (2) weeks after May 30 (the 15th day after May 15, 1986 and the last day under Rule 21c for filing of the Motion for extension of time to file statement of facts). This is true notwithstanding the Second Motion was mailed to the Clerk on May 12, 1986, plenty of time prior to May 30, 1986 and was received by Respondent's attorney on May 16, 1986.

Rules 386 and 21(c) are in this context in the nature of statutes of limitations, and this case is similar to the situation in which a statute of limitations was held to violate the constitutional guaranty of access to the courts,

where a medical malpractice plaintiff did not discover a sponge was left in his abdomen until more than two (2) years after the appendectomy, see *Neagle v. Nelson,* 685 S.W.2d 11, 15 (Tex. 1985), and to the situation in which medical malpractice plaintiff did not discover the nature of her injury until nine (9) years after her operation, see *Baldridge v. Howard,* 708 S.W.2d 62, 66 (Tex. Civ. App.—Dallas, no writ) at page 66. In *Neagle,* the holding was based upon the assumption that Neagle *reasonably* should not have known of his injury during the period of limitation, (see concurring opinion, 685 S.W. 2d at 14). Similarly, the undersigned attorney should *reasonably* not have known that the Petitioner's Motion had not been received by the Clerk of the Court of Appeals until notice from the Clerk which was given which was *after* the 15th day prescribed by Tex. R. Civ. P. 21c.

APPENDIX 15

Clerk's notice that Petitioner's application for writ of error was refused by the Supreme Court of Texas with the notation No Reversible Error.

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

May 20, 1987

Mr. Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

Mr. James R. Stevens, Jr.
Exxon Corporation
1839 Exxon Building
P. O. Box 2180
Houston, TX 77252

Mr. W. C. McClain
McClain, Harrell & McClain
InterFirst Bank Tower
300 West Davis, Suite 401
Conroe, TX 77301

RE: Case No. C-6336

STYLE: PEGGY KERR DAVIS
v: EXXON CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ BLANCA E. MORIN
Deputy

APPENDIX 16

Excerpts from Petitioner's motion for rehearing in the Supreme Court of Texas including the portion preserving constitutional questions.

* * *

[1]

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* * *

[4]

NO. C-6336

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

PEGGY KERR DAVIS,
Petitioner,

v.

EXXON CORPORATION,
Respondent

PETITIONER'S MOTION FOR REHEARING

TO THE SUPREME COURT OF TEXAS:

Petitioner PEGGY KERR DAVIS respectfully submits this Motion for Rehearing in response to the Supreme Court's ruling of May 20, 1987, refusing Petitioner's Application for Writ of Error with the notation, No Reversible Error, and requests that the Supreme Court withdraw its ruling, and reverse and render judgment for Petitioner, ordering a full accounting as prayed for.

POINTS OF ERROR

Point of Error No. 1

The Supreme Court erred in refusing Petitioner's Application with the notation, No Reversible Error because

Humble's breach of the confidential relationship was a judicially admitted uncontroverted fact.

[5]

Point of Error No. 2

The Supreme Court erred in refusing Petitioner's Application with the notation, No Reversible Error because the gaining of substantial benefits by Exxon was a judicially admitted uncontroverted fact.

Point of Error No. 3

The Supreme Court erred in refusing Petitioner's Application with the notation, No Reversible Error because Respondent Exxon failed to carry its burden to show that the Petitioner's suit was barred by the statutes of limitation.

Point of Error No. 4

The Supreme Court erred in refusing Petitioner's Application with the notation, No Reversible Error because the Court of Appeals' failure to grant Petitioner's second motion for extension of time to file the Statement of Facts was a violation of Petitioner's constitutional rights to ready access to the courts.

ARGUMENTS AND AUTHORITIES

A. Respondent Exxon Judicially Admitted the Breach of the Confidential Relationship, Making Unnecessary a Motion to Deem Admitted or Introduction into Evidence.

Respondent's inference of "problems" (see Reply to the Application for Writ of Error, hereinafter "Reply", pages 26-27) with its judicial admission of the breach of the confidential relationship (see Application for Writ of Error, hereinafter "Application", pages 3-4 and 16-17), which Exxon suggests inhere in not introducing the admission into evidence (Reply, page 27) and not moving to determine the sufficiency of the admission (footnote 12, page 27 of Reply) is simply groundless. Rule 169 in effect when the admission was requested provided that:

> ". . . Each of the matters of which an admission is requested *shall be deemed admitted unless* . . . the party to whom the request is directed, delivers . . . a sworn statement either denying specifically the matters . . . or setting forth in detail the reason why he cannot truthfully admit or deny those matters . . ." see 2 Vernon's Ann. Rules Civ. Proc. (1976), rule 169, pages 386-387 (emphasis added)

[6]

The most that can be said is that a part of the request (that there was nothing in Respondent Exxon's files "reflecting an express communication of notice to" Petitioner Davis—see Petitioner's Application for Writ of Error, hereinafter "Application", page 4) was admitted and the remaining part (that "Humble never gave notice" to Petitioner) was neither admitted nor denied, and the entire request is therefore taken as admitted, see *Bowman Biscuit Co. of Texas v. Hines,* 240 S.W.2d 467, 470 (Tex. Civ. App.—Dallas 1951—certified questions answered 251 S.W.2d 153) at page 470. Also, it was the obligation of Respondent Exxon and not Petitioner Davis to file a motion if Exxon did not desire to have

the request deemed admitted and having failed to do so, admission occurred by default, see *Packer v. First Texas Savings Association of Dallas,* 567 S.W.2d 574, 575 (Tex. Civ. App.—Eastland 1978, writ ref'd. n.r.e.) at page 575. Lastly, it was not necessary to introduce the admission into evidence, see *Howard v. Western Chevrolet Company,* 372 S.W.2d 378, 380 (Tex. Civ. App.—Eastland 1963, writ dism.) at page 379. Exxon's representation (Reply, page 29) that Petitioner has never made this argument before is wrong. Petitioner argued this admission in the Court of Appeals [see Appellant's Reply to Brief of Appellee, Item (ii), page 11] and argued it was undisputed that no such notice was given in the trial court (Tr. 36).

Reversal and rendition of judgment for Petitioner should follow, see *Billings v. Atkinson,* 489 S.W.2d 858, 861 (Tex. 1973), and 5 B CJS Appeal & Error § 1930 at pages 442-443, from the entry of the erroneous take nothing judgment (Tr. 68-72) contrary to the two uncontroverted and undisputed operative facts:

(1) There was a confidential relationship, since Jury Finding No. 5 that there was a confidential relationship is presumed to be supported by sufficient evidence, see *Guthrie v. National Homes, Inc.,* 394 S.W.2d 494, 498 (Tex. 1965) at page 495: and

(2) There was a breach of the confidential relationship, since Respondent Exxon judicially admitted that it breached the confidential relationship by failing to make a full disclosure by not notifying Petitioner of the plugging and abandoning of the First Well (see above and Application at pages 3-4 and 16-17).

[7]

* * *

B. Since Humble's Breach of the Confidential Relationship Was a Judicially Admitted and Uncontroverted Fact, and Exxon Did not Try the Case on the Theory that the Transaction Was Fair and Waived that Affirmative Defense, Requesting an Issue on Whether the Confidential Relationship Was Breached Was Unnecessary

The record shows that Exxon did not try the case on the theory that the transaction was fair and raised this theory after judgment (see Application, pages 6-9 and 20-22). Also, Exxon waived the affirmative defense of fairness of the transaction (see Application, pages 19-20), and failed to discharge its burden of showing fairness of the transaction (see Application, pages 17-20). Therefore, contrary to Respondent's inference (see Reply, page 26), it was unnecessary for Petitioner Davis to request an issue inquiring if Exxon breached the confidential relationship, see *Texas Bank and Trust Co. v. Moore,* 595 S.W.2d 502, 513 (Tex. 1980) where the court held at page 509:

> " . . . The presumption of unfairness stads unrebutted in any respect and in this posture of the case the bank as plaintiff was not required to request an issue inquiring if Moore breached a fiducial obligation to Mrs. Littell . . ."

[8]

Also, since Exxon, as pointed above, judicially admitted a breach of the confidential relationship, it was not

necessary for an issue on such uncontroverted breach to be submitted to the jury, see Tex. R. Civ. P. 277, 279, *Southern Underwriters v. Wheeler,* 123 S.W.2d 340, 341 (Tex. Commn. App. 1939, op. adopted) at page 341; *Southern Underwriters v. Tullos,* 151 S.W.2d 789, 790 (Tex. 1941) at page 790.

C. The Gaining of Substantial Benefits by Exxon Was a Judicially Admitted Uncontroverted Fact

As stated in *Texas Bank & Trust Company v. Moore,* supra, 595 S.W.2d at pages 508-509:

> " . . . Where trust is reposed and *substantial benefits gained,* equity will recognize that the beneficiary in such transaction is a fiduciary, and as such is under the fiducial obligation of establishing the fairness of the transaction to his principal . . .". (emphasis added)

Exxon employee Riggs' sworn Affidavit (Supp. Tr.B 146-173) judicially admits that Exxon received $281,033.16 [$185,071.52 for oil (Supp. Tr.B, page 166) and $95,961.64 for gas (Supp. Tr.B, page 170)] through June, 1985 that Petitioner Davis as a 3/32 overriding royalty owner in the Second Lease would have received, had Exxon recognized her interest in the Second Well and Lease. Petitioner prayed for a constructive trust on said Second Lease and an accounting and damages amounting to 3/32 of 7/8 of the total value of all oil production and 3/32 of the market value at the wellhead of all gas production from and allocated under the Conroe Field Unit Agreement to the Second Well and Lease from date of first production, interest as provided by law and costs (Tr. 10). Exxon's answers to interrogatories (see Supp.Tr.C, pages 7-16) refer to predecessor

Humble's net interest of 0.449833 in the oil and gas reserves of the First Well [Answer 3(A) Supp. Tr. C, page 7], and state that Respondent Exxon's revenue interest in the First Well was an .833 working interest [Answer 16(A) Supp. Tr. C, page 15] and that Exxon's revenue interest in the Second Well is 100% of the working interest [Answer 17(A) Supp. Tr. C page 15]. An Exxon Brief in the trial court states that: "The

[9]

Second Lease was included in the Conroe Field Unit, of which Exxon is the operator." (Supp. Tr.B.47).

Respondent has judicially admitted that Petitioner's husband, Lamar Davis " . . . states that he would have leased the unleased tract . . ." (see Appellee's Brief in the Court of Appeals, page 22), but by the time he "FOUND IT" in 1973 (see pages 9-13 hereinafter), Exxon had already re-leased the tract in 1971 and drilled the Second Well in 1973 (see Reply, page 16). Thus was Exxon unjustly enriched at Petitioner's expense.

D. Exxon Failed to Carry Its Burden to Show that Suit Was Filed More than Four Year After the Statute of Limitations Began to Run.

1. Finding 8 should have been disregarded because it was rendered immaterial by Finding 7, since Petitioner had no duty to exercise reasonable diligence until "MR. DAVIS FOUND IT" in 1973 which was less than two years before the filing of suit on December 4, 1974.

Petitioner has heretofore pointed out the immateriality of Finding 8 (Tr. 32) and the error of the trial court in

failing to disregard it [see motion to disregard (Tr. 38), motion for new trial (Tr. 73), Appellant's Amended Brief and Reply, etc. in the Court of Appeals (page 8, and Application herein, page 26].

(a) Petitioner had no duty to exercise reasonable diligence until she acquired knowledge of facts that would cause a reasonably prudent person to make an inquiry.

The four year statute of limitations applied, see *Culver v. Pickens,* 176 S.W.2d 167, 171 (Tex. 1943) at 170 (suit brought 3 days before statute runs not barred), and the statute of limitations begins to run only from the time of actual discovery of facts that would cause a reasonably prudent person to make an inquiry, see *Franklin County v. Tittle,* 189 S.W.2d 773, 775 (Tex. Civ. App. —Texarkana 1945, writ ref'd) at page 775, and *Cecil v. Dollar,* 218 S.W.2d 448, 451 (Tex. 1949) at page 450 (suit brought 1 year after knowledge of relevant facts acquired not barred).

The language from *Courseview* quoted by Exxon (see Reply, page 24) applies to arms length transactions (not confidential and fiduciary relationships). If Exxon had read a little further, it would have come upon the Court's holding:

[10]

" . . . On the other hand, *limitation does not begin to run* in favor of a trustee and against the cestui *until* the latter has *notice of a repudiation of the trust,* and there is *no duty to investigate* at least *until the cestui has knowledge of facts sufficient to*

excite inquiry . . .", 312 S.W.2d at page 205 (emphasis added).

This holding is consistent with that in *Andretta v. West,* 415 S.W.2d 638, 642 (Tex. 1967) at page 642 that the statute of limitations begins running when the beneficiary of a confidential relationship:

". . . had information that would have led a person of ordinary prudence to a discovery of the facts . . ."

(b) The jury found that Petitioner acquired knowledge of facts that would cause a reasonably prudent person to make an inquiry "WHEN MR. DAVIS FOUND IT" in 1973, less than two years prior to the filing of suit on December 4, 1974.

Exxon judicially admitted in its brief (see authorities cited in Application, page 3) in the Court below and in this Court that:

" . . . *At trial, Lamar Davis did testify that he NOTICED the First Well was plugged at some unspecified time IN 1973* . . ." (see Respondent's Brief in the Court of Appeals, footnote 9, page 12, and Reply herein, footnote 8, page 16—emphasis added).

"NOTICED" means to have taken notice of with the senses, see Webster's Third New International Dictionary, G. C. Merriam Company, 1971, at page 1544. Petitioner's husband, Lamar Davis, a petroleum engineer, had in March, 1985 stated in his uncontroverted Affidavit opposing Exxon's motion for summary judgment that:

> " . . . *DURING 1973* when I was in the immediate vicinity of the Becker No. 1 Well on business for a client, Paul Malone of Texas City, *I NOTICED that the Becker No. 1 Well had been plugged and abandoned* and that the tank battery (which had been used for gas separation and storage of oil production for the Becker No. 1 Well) was gone. *This is the first notice or knowledge to either me or my wife that Humble had plugged and abandoned the Becker No. 1 Well . . .*" (emphasis added)

Exxon has never at any time denied, responded to or disputed this in any way (see Application, page 9).

The jury believed Davis' testimony that:

> " . . he NOTICED the First Well was plugged at some

[11]

> unspecified time IN 1973 . . .",

because its verdict was that Petitioner Davis had "knowledge of facts that would cause a reasonably prudent person to make an inquiry" ". . . WHEN MR. DAVIS FOUND IT . . .", in the following finding:

SPECIAL ISSUE NO. 7

> Find from a preponderance of the evidence the date on which the plaintiff learned that the Herman Becker Well No. 1 ceased to produce.
>
> Answer: WHEN MR. DAVIS *FOUND* IT.
>
> In connection with this issue you are instructed that *knowledge of facts that would cause a reasonably prudent person to make an inquiry* which would

> lead to the discovery that the Herman Becker Well No. 1 ceased to produce, constitutes knowledge that the well ceased to produce. (Supp. Tr. C, page 2, and Tr. page 31—emphasis added)

"FOUND" means to have discovered through the senses, see 36A C.J.S. *"Find"* at page 413. Thus, Davis' testimony that he "NOTICED" it (or took notice of it through the senses, see definition above, page 8) and the jury's finding that he "FOUND IT" have substantially the same meaning.

In its Reply and Brief below, Exxon renewed its trial contention [see Item A(i) Application, page 7] that Petitioner had a duty to and failed to investigate, identifying the sources of information which Respondent contends Petitioner could have investigated to determine that the First Well had been plugged and abandoned:

> ". . . But there was also the following evidence introduced at trial: 1) the plugging of the First Well was a matter of public record at the Texas Railroad Commission; 2) after 1969, production from the First Well no longer appeared on Railroad Commission schedules; 3) the Conroe Operators Association, which maintained Conroe Field information to which Lamar Davis had access, recorded that the First Well was not producing; and 4) the Davis overriding royalty checks stopped after November, 1969 . . ." (see again Respondent's Brief in the Court of Appeals, footnote 9, page 12, and Reply herein, footnote 8, page 16).

The instructions to Exxon's requested issues 7 (see Supp. Tr. C, page 2, and Tr. 31) and 8 (see Supp. Tr. C, page 3 and Tr. 32), both using the phrase:

[12]

> ". . . knowledge . . . that would cause a reasonably prudent person to inquire . . ."

also indicate Respondent's limitation contention was that Petitioner should have investigated. But as above pointed out (page 8-9 above), the jury found (Finding 7, Tr. 31) that Petitioner had "knowledge of" such "facts" in 1973, less than two years prior to the filing of suit.

There are many similarities between *Courseview* and the instant case. Therein an agreement required written notice by the fiduciary to the beneficiary, see *Courseview*, 312 S.W.2d at page 200, and here the confidential relationship required a full disclosure by fiduciary Humble to beneficiary Davis (see Application pages 16, 17, 18, and 22). In that case, the fiduciary made incorrect factual representations to the beneficiary about the documents without later correcting them, 312 S.W.2d at 206, and here fiduciary Humble failed to disclose its plans to plug and abandon the First Well to beneficiary Davis in its said May 19, 1969, letter, without later disclosing such plans or the fact of abandonment in connection with the last royalty check dated December 7, 1970 (Supp. Tr. B, page 76). There Farnsworth, President of the corporate beneficiary, see 312 S.W.2d at page 205, and here Lamar Davis, husband of Petitioner (see Reply, pages 9-11 and Supp. Tr. B, pages 77-81) both were experienced in the oil business. Both there, 312 S.W.2d at 204, and here (Tr. 29), there was an unchallenged jury finding of a confidential relationship. In that case, 312 S.W.2d at 204, and in this (Special Issue No. 8, Tr. 32) the jury found that the beneficiary failed to exercise reasonable diligence.

Yet the Court held in *Courseview,* 312 S.W.2d at 206:

> ". . . In view of *the relationship of the parties* and Phillips' contractual obligation to give notice of purchases in the designated area, *Beaty cannot be charged with lack of diligence* in failing to examine the records or make inquiry of Phillips *until it had knowledge of some fact that should have aroused its suspicions* . . ." (emphasis added)

This holding is consistent with the holdings in *Andretta v. West,* supra, applicable hereto, see Application, pages 23-25.

The May 19, 1969, letter (see Application, pages 4-5, and Supp. Tr. B-75), the

[13]

April 28, 1969 telephone conference referred to therein, and the royalty check received by Petitioner in December, 1970 (see Supp. Tr. B-76 and Reply, footnote 6, page 15) have been judicially admitted by Exxon to be:

> ". . . the *only contact with Humble* that *petitioner ever had* . . ." (see Reply, page 14, emphasis added).

Therefore, Petitioner:

> ". . . cannot be charged with lack of diligence to examine the records or make inquiry of . . .", see *Courseview,* 312 S.W.2d at page 206,

Humble, since according to the jury (Finding 7, Tr. 31) Petitioner did not:

> ". . . have knowledge of some fact that should have aroused . . . suspicions . . .", id.,

until 1973, less than two years before the filing of suit (see above, pages 9-12) on December 4, 1974.

Interfirst Bank - Houston v. Quintana Petroleum, 699 S.W.2d 864, 879 (Tex. App.—Houston 1985, writ refd, n.r.e.) cited by Exxon (see Reply, page 26) applied the same rule emphasizing:

> ". . . knowledge of facts that would have excited inquiry into the mind of a reasonably prudent person, which, if pursued by him with reasonable diligence, would lead to a discovery of the fraud . . .", see 679 S.W.2d at page 876.

That case, however, is inapplicable because there it was undisputed that a testamentary Trustee (not a cestui or beneficiary of a confidential relationship) was chargeable with knowledge of the testator's inventory and audits made by previous trustees beyond the statute of limitations, see 699 S.W.2d at page 876. Here, the "knowledge of facts" was acquired in 1973, less than 2 years prior to the filing of suit.

2. Finding 8 should have been disregarded because it is in fatal conflict with Finding 7.

Special Issue No. 7 was answered before Special Issue No. 8, in response to which the jury found that Petitioner should have learned that the First Well had ceased to produce since she had acquired "knowledge that would cause a reasonably prudent person

[14]

to make an inquiry" as of January 30, 1970, as follows:

SPECIAL ISSUE NO. 8

> Find from a preponderance of the evidence the date by which the plaintiff, through the exercise of reasonable diligence, should have learned that the Herman Becker Well No. 1 ceased to produce.
>
> Answer: JAN. 30, 1970.
>
> In connection with this issue you are instructed that reasonable diligence means that degree of care that would be taken by *a person of ordinary prudence* if placed in the same situation as the plaintiff. You are further instructed that once a person, situated as was the plaintiff, has *acquired knowledge that would cause a reasonably prudent person to inquire* whether or not the Herman Becker Well No. 1 ceased to produce, that person has a duty to investigate whether or not the well ceased to produce. Such an investigation must be carried out with reasonable diligence. (Supp. Tr. C, page 3 and Tr. page 32—emphasis added),

A judgment based on Finding 7 would have to be for Petitioner since suit was filed on December 4, 1974, less than two years after she (according to Finding 7) acquired "knowledge of facts that would cause a reasonably prudent person to make an inquiry" in 1973 (see above, pages 8-11); whereas a judgment based on Finding 8 would have to be for Respondent, since suit was filed on December 4, 1974, more than 4 years after Petitioner (according to Finding 8) acquired "knowledge that would cause a reasonably prudent person to make an inquiry" as of January 30, 1970. Finding 8 is thus in hopeless conflict with Finding 7, see *Little Rock MFG. Co. v. Dunn*, supra, 222 S.W.2d at page 991, and both Findings cannot be true.

A judgment based on conflicting findings must be set aside, see *Little Rock MFG. Co. v. Dunn,* supra, 222 S.W.2d at page 991. Where two findings with respect to a material fact are such that both cannot be true, then neither can stand, see *Pearson v. Doherty,* 183 S.W.2d 453, 457 (Tex. 1944) at page 455. Finding 8 (Tr. 32) being in conflict with Finding 7 (Tr. 31) should have been disregarded, and the result is that Exxon failed to carry its burden to secure findings that the suit was filed more than four years after the statute of limitations began to run, see *Intermedics, Inc. v. Grady,* 683 S.W.2d 864, 879 (Tex. App.—Houston 1984, no writ).

[15]

Petitioner's arguments made in her Application for Writ of Error (see Application, pages 26-29) support this contention. On May 12, 1986, Petitioner mailed to the Court of Appeals her Second Motion for Extension of Time to file Statement of Facts, which was never received by the Clerk of that court [see Reply, page 4 and Appellant's Motion for Extension of Time to File Appellant's Second Motion for Extension of Time to File Statement of Facts (hereinafter "Motion"), paragraph 2 and Affidavit of Truzan Amos], although copies of the same were received on May 16, 1986 by Respondent's counsel. Instead of notifying Petitioner's counsel that said Motion had not been received by letter dated May 16, 1986 (the day after the due date for filing of the Statement of Facts under the previous extension), the Clerk waited until June 6, 1986 (see Exhibit "D" attached hereto) to mail notice to Petitioner's counsel that a second motion for extension had not been received, which letter was postmarked June 9, 1986 and delivered by the

postman to the office of Petitioner's counsel on June 11, 1986. This was almost two (2) weeks after the deadline of May 30, 1986 (the 15th day after May 15, 1986 and the last day under Rule 21c for filing of the motion for extension of time to file statement of facts).

At least, if the Clerk had so notified Petitioner's counsel by letter dated May 16, 1986, Petitioner would have been able to file a second motion "with the Court of Appeals not later than fifteen (15) days after the last date for filing" the Statement of Facts, see Tex. R. Civ. P. 21c, and Rule 54(c). It would have been just as easy for the Clerk to notify Petitioner's counsel by letter dated May 16, 1986, as it was for said Clerk to notify Petitioner's counsel by letter dated June 6, 1986. The only difference is that as of the latter date, Petitioner was unable to comply with the Rules 21c or 54(c) since the Clerk's notice was set out too late. This is unfair and is a denial of Petitioner's constitutional right to ready access to the courts.

* * *

APPENDIX 17

Clerk's notice that Petitioner's motion for rehearing was overruled by the Supreme Court of Texas.

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

July 15, 1987

Mr. Charles L. Black Aycock
755 American General Tower
2727 Allen Parkway
Houston, TX 77019

Mr. James R. Stevens, Jr.
Exxon Corporation
1839 Exxon Building
P. O. Box 2180
Houston, TX 77252

Mr. W. C. McClain
McClain, Harrell & McClain
InterFirst Bank Tower
300 West Davis, Suite 401
Conroe, TX 77301

RE: Case No. C-6336

STYLE: PEGGY KERR DAVIS
v: EXXON CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ BLANCA E. MORIN
Deputy